Supreme Court, U.S.
FILED
MAR 20 1991
OFFICE OF THE CLERK

No. 90-1143

In the Supreme Court of the United States

OCTOBER TERM, 1990

PRECISE CASTINGS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that it is permissible to use English-only ballots in a Board-conducted election if foreign language notices translating the ballot and explaining the election procedure are posted prior to the election.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 915 F.2d 1160. The decision and order of the National Labor Relations Board (Pet. App. 10a-21a) are reported at 294 N.L.R.B. No. 94. The Board's decision and certification of election (Pet. App. 22a-24a) and the hearing officer's report (Pet. App. 25a-44a) in the underlying representation proceeding are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9a) was entered on October 17, 1990. The petition for a writ of certiorari was filed on January 15,

1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In May 1988, the Union [1] filed a petition with the National Labor Relations Board seeking certification as the exclusive bargaining agent of a unit of production and maintenance employees at petitioner's Franklin Park, Illinois, facility. The unit covered about 40 employees, approximately ten of whom speak and read Spanish but cannot speak or read English. Pet. App. 1a, 26a, 30a. During discussions about the details of the election, petitioner's attorney asked the Board agent handling the case to provide both Spanish-language election notices and Spanish-language ballots. The Board agent responded that the regional office would issue election notices, on request, in any foreign language, but that it was this region's policy to use only English-language ballots in elections. *Id.* at 30a-31a.

Petitioner received notices of the election in both English and Spanish, and posted the notices in the employees' break area. Pet. App. 32a. The notices set forth information about the employees' rights and the election procedure. The English-language notice displayed a sample of the English-language ballot that would be used in the election. The Spanish-language notice displayed a Spanish translation of the sample ballot. Immediately above the sample ballot on the Spanish-language notice was a sentence informing the voters that the ballot handed them at the election would be identical except that it would be in

[1] Local 18-B of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO, Furniture Workers Division.

English. *Id.* at 5a, 38a-39a, 42a. A secret ballot election was held on July 28, 1988. The Union won by a vote of 18 to 13. *Id.* at 1a, 22a-23a, 25a-26a, 28a-29a.

2. Petitioner filed objections to the conduct of the election. Petitioner contended, among other things, that the election should be set aside because Spanish-language ballots had not been provided to the ten voters who could not read English. The Board's hearing officer concluded, however, that there was no evidence that the notice and balloting procedures used in the election were confusing to the employees. Pet. App. 41a-43a.

The hearing officer rejected petitioner's contention that Board rules required multilingual ballots whenever notices in more than one language were used. He concluded that where there are multilingual notices, the Board has found it unnecessary to have multilingual ballots as well. Pet. App. 37a-39a, citing *Thomas A. Nelson*, 168 N.L.R.B. 802 (1967), and *Marriott In-Flite Services*, 171 N.L.R.B. 742, 743 n.4 (1968), enforcement denied, 417 F.2d 563 (5th Cir. 1969), cert. denied, 397 U.S. 920 (1970). He also noted that in some of the Board cases where multilingual ballots had been used the use of such ballots had been the subject of election objections, the losing party alleging that the ballot contained translations in so many foreign languages as to be confusing to voters. Pet. App. 34a-39a. The hearing officer justified the use of an English-language ballot for all voters on the ground that "the ballot remains as simple as possible to all voters while still understandable (when combined with Notices) to those voters who neither read nor write English." *Id.* at 38a-39a.

The hearing officer also rejected petitioner's contention based on a statement in the General Counsel's internal administrative manual that, if a foreign language is used in a notice, that language must also be used on the ballot. Pet. App. 36a-37a. He noted that the foreword to the manual stated that the manual "is intended to provide procedural and operational guidance for the Agency's staff in the handling of representation cases," that "[i]t is not intended to be a compendium of either substantive or procedural law," that "[t]he guidelines included are not Board rulings or directives," that "it is also expected that there may be departures [from the guidelines] through exercise of professional judgment in varying circumstances," and that any guidelines contained therein "are not intended to be and should not be viewed as binding procedural rules." *Id.* at 36a-37a (emphasis omitted), quoting NLRB Casehandling Manual (Pt. 2), Representation Proceedings, Introduction and Purpose.[2]

Petitioner filed exceptions to the hearing officer's report. Thereafter, the Board adopted the hearing officer's findings and recommendations, and certified the Union as the representative of the bargaining unit. Pet. App. 22a-24a. After certification, petitioner refused to bargain with the Union in the certified unit. The Board found that petitioner's refusal to bargain violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1); and entered a bargaining order. Pet. App. 15a.

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[2] In the September 1989 revision of the Casehandling Manual, the relevant provision of the Manual was amended to make clear that the use of a foreign language on the ballot is discretionary. See NLRB Casehandling Manual (Pt. 2), Representation Proceedings, § 11314 (1989).

3. The court of appeals enforced the Board's order. Pet. App. 8a. Relying upon *NLRB* v. *A.J. Tower Co.*, 329 U.S. 324 (1946), the court noted that "the Board possesses discretion to set the rules for conducting elections and to determine what procedures suffice to protect employees' right to choose." Pet. App. 4a. Applying that principle, the court concluded that use of multilingual notices and English-only ballots was a reasonable exercise of the Board's discretion.

The court observed that "most ballots in political elections are in English" and that "[m]aking labor elections more like political elections is among the Board's legitimate choices." Pet. App. 4a. Moreover, "[t]he Board does not leave the workers to learn from the election campaign alone." *Id.* at 5a. The Board, upon request, will provide elaborate foreign-language election notices, complete with sample ballots and explanations, in all foreign languages spoken by employees, that advise the employees that the actual ballot will be in English. Therefore, "[a]nyone who takes the trouble to read the notice will be equipped to vote accurately." *Ibid.*

The court rejected the argument that foreign-language notices were insufficient because employees might not read them. The court concluded that it was within the Board's discretion to concentrate on giving employees "a reasonable *opportunity* to vote intelligently, without taking all possible steps to ensure that they do," particularly because the other options "have problems of their own." Pet. App. 6a. The court noted that printing ballots in different languages for members of different language groups runs the risk of allowing the parties to "link a vote to a given voter, breaching the confidentiality of the

polling place." *Ibid.* And experience has shown that putting "all of the languages on every ballot" works "less well as the number of languages increases—and as the ballot must include languages that cannot be expressed in the Roman alphabet." *Ibid.*

The court also found petitioner's reliance on *Marriott In-Flite Services* v. *NLRB*, 417 F.2d 563 (5th Cir. 1969), cert. denied, 397 U.S. 920 (1970), to be misplaced. Pet. App. 2a-3a. Although the *Marriott* court believed that the Board in that case had departed from its policy of always using multilingual ballots, see 417 F.2d at 567, the court below observed that any such Board policy no longer exists. Pet. App. 2a. The court below added that changes in the Board's philosophy toward the regulation of representation elections have "pulled the rug out from under" the Fifth Circuit's decision in *Marriott*. Pet. App. 3a (citing, *e.g.*, *Midland National Life Ins. Co.*, 263 N.L.R.B. 127 (1982)).

Finally, the court of appeals rejected petitioner's assertion that it was improper for the Board to leave "to its regional directors the choice among multilingual ballots, ballots in different languages, and English-language ballots plus election notices in other languages." Pet. App. 7a. The court concluded that "[n]othing in the National Labor Relations Act prevents the Board from giving its subordinates discretion in matters of this kind." *Id.* at 7a-8a. Moreover, the court noted, the Board could reasonably decide that, by allowing its regional offices to follow different paths, it could "learn" from their experiences "about the need for or effects of its rules." *Id.* at 8a. Indeed, the court added, allowing such differences permits the Board to determine which of several competing options is preferable or to decide that "the

costs and benefits of the competing options are so closely balanced that uniformity is unnecessary." *Ibid.*

ARGUMENT

As this Court has explained, the control of a representation election proceeding and the determination of the steps necessary to conduct that election fairly are "matters which Congress entrusted to the Board alone." *NLRB* v. *Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940). Thus, the Board has a "wide degree of discretion" in its regulation of the conduct of representation elections, *NLRB* v. *A. J. Tower Co.*, 329 U.S. 324, 330 (1946), and any representation election conducted under the specific safeguards provided by the Board's procedures is presumed fair and regular unless proven otherwise. See *NLRB* v. *Mattison Mach. Works*, 365 U.S. 123, 123-124 (1961).[3] The court of appeals correctly concluded that the Board properly exercised its discretion here. The court's decision does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

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[3] There is no merit to petitioner's contention (Pet. 29 n.11, 30) that because *A.J. Tower Co.* was decided before the 1947 amendments to the Act—and, specifically, before the addition to Section 7 of the right to refrain from union and other protected, concerted activity—its recognition of the Board's broad discretion with respect to election matters is of dubious continuing validity. This Court has consistently confirmed that the Board's policies in representation matters are due great deference. See *NLRB* v. *Financial Institution Employees, Local 1182*, 475 U.S. 192, 201-202 (1986); *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969). And contrary to petitioner's implication, the Board's policy here has no different impact on employees who may oppose the union than on those who support it.

1. The Board has developed flexible procedures for accommodating the election process to the needs of voters literate only in a foreign language. Under the Board's current policy, where (as here) the parties give the Board's regional office timely notice that some voters do not read English, the regional office will provide foreign-language notices and sample ballots that are designed for posting by the employer and that explain the balloting procedure and the type of ballot to be used. See 52 Fed. Reg. 7450 (1987) (explanatory remarks). The Board requires that foreign-language notices provide a complete and reasonably accurate translation of all the information provided to English-language employees on the English-language notice of election. *Rattan Art Gallery, Ltd.*, 260 N.L.R.B. 255, 256-257 (1982); *Flo-Tronic Metal Mfg., Inc.*, 251 N.L.R.B. 1546 (1980); *Thermalloy Corp.*, 233 N.L.R.B. 428 (1977). See *Tanforan Park Food Purveyors Council* v. *NLRB*, 656 F.2d 1358 (9th Cir. 1981). Consistent with that requirement, the Spanish-language notice used in this case contained a translation of the official ballot and all other portions of the notice of election.[4]

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[4] Petitioner asserts (Pet. 32) that there is "insufficient evidence in the record below that this election was conducted in such a way as to insure that employees * * * were afforded a fair opportunity to be apprised of the important choice [with which] they were faced." However, the premise of this argument—that the burden is on the Board to show that the election was fairly conducted—reverses the appropriate allocation of the burden of proof. Thus, a Board-conducted election is presumed to have been fair and regular, and it is the objecting party that must show that, in fact, it was not. *NLRB* v. *Mattison Mach. Works, supra.* As both the Board and the court below found (Pet. App. 2a, 8a)—and petitioner apparently concedes (see Pet. 7-8, 14, 15 & n.4)—there is no evi-

Many regional offices will also provide foreign-language ballots like those petitioner requested here.[5] No Board rule or decision, however, requires that foreign-language ballots be provided on demand. See *NLRB* v. *Lowell Corrugated Container Corp.*, 431 F.2d 1196, 1197 (1st Cir. 1970). To the contrary, the Board has expressly held that a regional director who has posted foreign-language notices explaining the election procedure has the discretion to use an English-only ballot in the election. *Thomas A. Nelson*, 168 N.L.R.B. at 803; *Marriott In-Flite Services*, 171 N.L.R.B. at 743 n.4. See also *Norwestern Products, Inc.*, 226 N.L.R.B. 653, 654 n.6 (1976) (noting the Board's continued adherence to its *Marriott* decision).

In refusing to mandate use of foreign-language ballots in all cases, the Board has taken into account the competing considerations of providing adequate information to non-English speakers, on the one hand, and maintaining secrecy of the ballot and ballot clarity, on the other. It is one thing to prepare sample ballots in any foreign language requested, and to make such samples a part of the relevant foreign-language translation of the Board's official notice of election. It would be quite another matter, however, to use foreign-language ballots in the election itself.

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dence that any of the voters in this election were "confused" by the notice and ballot procedures used.

[5] See, *e.g.*, *Bridgeport Fittings, Inc.* v. *NLRB*, 877 F.2d 180, 187 (2d Cir. 1989) (ballot printed in English, Spanish, Portuguese, and handwritten in Laotian); *Tanforan Park Food Purveyors Council* v. *NLRB*, 656 F.2d 1358 (9th Cir. 1981) (Samoan-English ballot); *Kraft, Inc. Retail Food Group*, 273 N.L.R.B. 1484 (1985) (ballot printed in Spanish and English and handwritten in Vietnamese and Laotian); *Rattan Art Gallery, Ltd.*, 260 N.L.R.B. 255 (1982) (English-Ilocano ballot).

As the Board has explained, the "secrecy of the ballot is, to a degree, violated whenever a block of votes, by reason of language, can be identified when counted." *Marriott In-Flite Services*, 171 N.L.R.B. at 743 n.1.[6]

The problem of ballot secrecy could be surmounted by constructing a single multilingual ballot for use by all voters. However, as the Board noted (Pet. App. 34a-39a), constructing multilingual ballots that are not confusing even to English-language voters has proven difficult, especially where portions of the official ballot must be handwritten. See, *e.g.*, *Kraft, Inc.*, 273 N.L.R.B. at 1484 (setting aside election because ballot printed in Spanish and English and handwritten in Vietnamese and Laotian was confusing in format).

Furthermore, a rule authorizing bilingual ballots only in seemingly "easy" cases, where there is but one foreign-language group, but withholding them in more complicated cases, also has its drawbacks. Attempts to hold down the number of languages on a multilingual ballot in the interest of readability would predictably raise concerns of discrimination against smaller groups, who would naturally be the ones excluded under any utilitarian calculus. *Kraft Inc.*, 273 N.L.R.B. at 1484-1485; see also *Bridgeport Fittings, Inc.* v. *NLRB*, 897 F.2d 180, 188 (2d Cir. 1989).[7]

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[6] This concern is particularly important because, like the instant election, Board-conducted elections typically involve fewer than 50 employees.

[7] Petitioner's contention (Pet. 16-24) that the Board has failed to articulate its rationale for its accommodation policy is without merit. As shown in the text, the Board, in a number of decisions, has explained its reasons for accepting some and rejecting other accommodation efforts. Contrary to petitioner's suggestion (see Pet. 17, 20 n.7), the fact that the

Moreover, as the court below noted (Pet. App. 4a), the Board's use of English-language ballots is consistent with the general practice in political elections. Indeed by assuring that each foreign-language voter has access to an election notice and sample ballot in his own language, the procedure followed here offers all language minorities a level of assistance exceeding that frequently afforded them in political elections.[8]

Board has explicitly addressed only some of those reasons in its decisions here does not detract from the fact that the Board has sufficiently articulated the basis of its order to "meet[] the criteria for judicial review." *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 443 & n.6.

There also is no merit to petitioner's assertion (Pet. 18-20) that the Board's decision here is inconsistent with some of the Board decisions discussed above. In *Kraft, Inc., supra*, the Board addressed the issue of whether a confusing multilingual ballot was grounds for setting aside an election once use of "a multilingual ballot [ha]s [been] deemed appropriate." 273 N.L.R.B. at 1484. It was in that context—in which a multilingual ballot was actually used—that the Board stated that a poor translation on, and a confusing layout of, the ballot created a defect that could not be cured by accurate election notices and the parties' campaigning. Thus, the *Kraft* decision fully supports the result here. *Rattan Gallery, Ltd.*, 260 N.L.R.B. 255 (1982), *Flo-Tronic Metal Mfg., Inc.*, 251 N.L.R.B. 1546 (1980), and *Thermalloy Corp.*, 233 N.L.R.B. 428 (1977), dealt not with a refusal to provide a foreign-language ballot, but with defects in foreign-language election notices.

[8] Petitioner attacks the court's finding that the procedure used here is essentially consistent with that used in political elections, suggesting (Pet. 31-32) that it is inconsistent with the Seventh Circuit's decision in *Puerto Rican Org. for Political Action* v. *Kusper*, 490 F.2d 575 (1973). However, *Kusper* supports—rather than undercuts—the use of the procedure chosen here. In *Kusper*, the court held only that under the Voting Rights Act of 1965, "a Spanish-speaking Puerto Rican is entitled to assistance in the language he can read or under-

2. Petitioner contends (Pet. 10-15) that there is a conflict warranting this Court's resolution between the decision below and decisions from three other circuits: *Marriott In-Flite Services* v. *NLRB*, *supra*; *Bridgeport Fittings, Inc.* v. *NLRB*, *supra*; and *Tanforan Park Food Purveyors Council* v. *NLRB*, 656 F.2d 1358 (9th Cir. 1981). No such conflict exists.

As the court below noted (Pet. App. 2a), the Fifth Circuit in *Marriott* believed that the Board had unaccountably departed from a policy of requiring bilingual ballots. Such a policy, if it existed then, does not exist now. Moreover, in *Marriott*, unlike here, the election notices posted near the polling place "contained no sample ballot in Spanish." 417 F.2d at 567. As a result, the Spanish-language voters in that case were never officially advised in their own language of the meaning of "the question and instructions on the ballot." *Ibid.* It was in this context that the *Marriott* court pronounced the Board's failure to provide "access to ballots in a language that [the foreign-language electorate] can understand" a "defect" that warranted setting aside the election. *Ibid.*[9]

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stand" (*id.* at 580). The court also approved the assistance ordered by the district court—that is, use of foreign-language notices and specimen ballots—and suggested that foreign-language ballots were unnecessary where foreign-language specimen ballots have been provided in advance. *Id.* at 576-577.

[9] Moreover, as the court below noted (Pet. App. 3a), the *Marriott* court's belief that "minimum laboratory standards of fairness" required foreign-language ballots was expressly linked to the Board's then-current election standards, including the Board's rules holding campaign representations to a higher standard than that allowed in the political arena. See

In *Bridgeport Fittings*, the one Vietnamese and two Cambodian voters about whom the court expressed concern had access to *neither* an election notice with specimen ballot nor a ballot in a language they could read and understand.[10] Moreover, because the court ultimately enforced the Board order, finding that the number of employees denied access to notices and ballots in their own language was small and the union's margin of victory was large, the court's statement about the ballot—that the Board's failure to include a version in Vietnamese and Cambodian gave "pause"—is dictum. 877 F.2d at 187-188. Finally, *Tanforan Park* involved the issue of the sufficiency of a foreign language notice. The court held that the Board should hold a hearing to ascertain whether the election notice was "garbled and confusing." 656 F.2d at 1362-1363 (Samoan translation allegedly suggested endorsement of union).

3. Petitioner asserts (Pet. 28 n.10) that the lack of uniformity of procedure among the Board's Re-

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417 F.2d at 567 & n.4. As the court below further noted (Pet. App. 3a), the Board's current policies assume that an informed employee electorate does not require extensive regulation of the campaign process. See *Midland National Life Ins. Co.*, 263 N.L.R.B. 127 (1982). While it is true, as petitioner asserts (Pet. 21-24), that the Board continues to set aside elections where irregularities in the election process may have affected the outcome of the election (see, *e.g.*, *Gory Associated Industries, Inc.*, 275 N.L.R.B. 1303 (1985); *Celotex Corp.*, 266 N.L.R.B. 802 (1983)), the question here is whether the Board reasonably concluded that foreign-language notices with sample ballots are adequate to assure an informed electorate.

[10] See *Bridgeport Fittings, Inc.*, Case 39-RD-67, Second Supplemental Decision and Certification of Representative at 13-14 (May 17, 1985).

gional Offices is fundamentally inconsistent with Congress's intention to have the Board establish a uniform national labor policy. There is no merit to that contention. As shown, Congress also vested the Board with broad discretion to establish rules for the conduct of representation elections. The court of appeals correctly decided that, in view of the substantial drawbacks to the use of foreign-language ballots, the Board could reasonably choose not to require uniformity but rather to allow different regional approaches as a way of learning whether one was preferable, or whether "the costs and benefits of the competing options are so closely balanced that uniformity is unnecessary." Pet. App. 8a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20438